Mail Contractors of America, Inc., Kansas City Terminal *and* American Postal Workers Union, Des Moines Area Local, AFL–CIO. Case 17–CA–21836

December 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 9, 2004, Administrative Law Judge Thomas M. Patton issued the attached decision. The Charging Party, American Postal Workers Union, Des Moines Area Local, AFL–CIO, filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to adopt the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. December 28, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] In adopting the judge's decision, we find on the record before the Board that the requirements of *RBE Electronics of S. D., Inc.*, 320 NLRB 80, 82 (1995), with respect to "an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely," were met here.

Although Chairman Battista agrees that the "economic exigency" exception in *RBE Electronics* applies here, he does not wish to suggest that this is the only possible exception to the general rule that an employer may not make unilateral changes in the absence of a general impasse. See, e.g., *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994); *TXU Electric Co.*, 343 NLRB No. 137 (2004).

Naomi L. Stuart, Esq., for the General Counsel.

Jeffrey W. Pagano, Esq. and *Herbert I. Meyer, Esq. (King, Pagano & Harrison*), of New York, New York, for the Respondent.

Anton Hajjar, Esq. (O'Donnell, Schwartz & Anderson, PC), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

Thomas M. Patton, Administrative Law Judge. A hearing was held in these cases at Overland Park, Kansas, on August 26–27 and November 4–6, 2003.[1] The charge was filed on August 22, 2002, by Des Moines Area Local, American Postal Workers Union, AFL–CIO.[2] The complaint issued on October 30, and was amended at the hearing.

The General Counsel, the Charging Party and the Respondent each filed posthearing briefs that have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses and after considering the probabilities and the briefs filed by the parties I make the following

I. FINDINGS OF FACT

A. The Employer

Mail Contractors Of America, Inc. (the Respondent or Employer) transports mail by over-the-road truck under contract with the United States Postal Service (the USPS). The Employer's corporate headquarters are located in Little Rock, Arkansas. Respondent admits and I find that it meets the Board's standards for asserting jurisdiction based on its operations and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organizations

The complaint alleges, the answer admits, and I find that Des Moines Area Local, American Postal Workers Union, AFL–CIO (the DM Local) is a labor organization within the meaning of Section 2(5) of the Act. The DM Local is an affiliated local of the American Postal Workers Union.

The American Postal Workers Union, AFL–CIO (herein the APWU) is a national union with headquarters in Washington, D.C. The record evidence and reported Board and Court decisions show that the APWU primarily represents a nationwide unit of employees of the United States Postal Service with whom it negotiates a national contract that is administered by affiliated local unions. I find that the APWU is a labor organization within the meaning of Section 2(5) of the Act.

[1] In a posthearing motion the General Counsel and the Charging Party moved to correct page 89, line 18 of the transcript from ". . . designated the one local . . ." to ". . . designated the Des Moines local . . . ." The motion is granted.

[2] All dates are 2002 unless otherwise indicated. The charge is date stamped as received in Region 27 on August 22, and served the same day.

C. Background

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by making unilateral changes in a health benefit plan for a unit of employees at the Employer's terminal in Kansas City, Kansas, without affording the exclusive representative of the employees prior notice and an adequate opportunity to bargain. The Respondent acknowledges that changes in a health benefit plan were made, but denies any violation of the Act. No other violations are alleged or urged.

The Respondent has about 2000 employees and operates 18 terminals in various states, including a terminal in Kansas City, Kansas (the KC terminal). The Employer has approximately 180 USPS point-to-point transportation contracts. The contracts are subject to competitive bid and are governed by the Service Contract Act, 41 U.S.C. §351 et seq. (the SCA). The USPS contracts have staggered expiration dates and are typically for a 4-year term. There are some 50–60 drivers at a number of satellite terminals. Each satellite driver is administratively assigned to 1 of the 18 terminals.

The KC terminal was formerly operated by another employer, Kasbar, Inc. In 1999, the Respondent acquired Kasbar and assumed a collective-bargaining agreement Kasbar had with a Teamsters local that covered drivers at that terminal. When the Teamsters contract expired on March 24, the Teamsters disclaimed interest in representing the unit. The Employer discontinued a health insurance that Kasbar had provided and the drivers at the KC terminal were brought under an employer-wide group health benefit plan.

The employer-wide plan was in effect at all other terminals at the time the Teamsters contract expired, other than four terminals that were subject to collective-bargaining agreements (CBA terminals). Those units (the CBA units) were at Des Moines, Iowa (the DM Unit); West Memphis, Arkansas (the WM Unit); Jacksonville, Florida (the JAX Unit); and Greensboro, North Carolina (the GB Unit). The APWU had organized the drivers at those terminals in 2001, and negotiated separate collective-bargaining agreements for each terminal that expired in 2003.[3] A discrete APWU affiliated local union was a named party to each of the four agreements.

In 2002, the APWU organized a unit of drivers at the KC terminal, plus drivers at satellite locations who were assigned to the KC terminal. There were approximately 80 employees in the unit (the KC unit). Based upon an agreement between the Employer and the APWU, voluntary recognition was granted on April 16, following a card check conducted by a Commissioner of the Federal Mediation and Conciliation Service (the FMCS).

The recognized KC unit is as follows:

> All regular drivers (full-time and extra board drivers) employed by the Employer who report to its Kansas City terminal located at 250 South 59th Street Lane, Kansas City, Kansas or any replacement facility thereof, but excluding all other employees, office clerical employees, mechanics, servicemen, casual drivers, seasonal drivers, guards and supervisors as defined in the Act.

The complaint was amended at the hearing to allege this description of the KC unit, which is admitted by the Respondent.

D. The Collective-Bargaining Representative

The complaint alleges that the DM Local has been the exclusive Section 9(a) representative of the KC unit since April. The answer denies this allegation and affirmatively alleges that it recognized the APWU.[4] The positions of the General Counsel and the Respondent were reiterated in the remarks of counsel at the opening of the hearing.

The Employer contends that the APWU designated the DM Local as the bargaining agent and that the APWU appointed Mark Dimondstein to be the chief spokesperson for the DM Local at the bargaining table. Dimondstein held the position of lead field organizer for the APWU at all relevant times. In contrast, the General Counsel contends that the DM Local alone was recognized as the Section 9(a) representative of the KC unit and that the DM Local appointed Mark Dimondstein individually to be an agent of the DM Local and to serve as lead negotiator for the DM Local in collective bargaining with the Employer. The significance of the distinction is that the General Counsel contends that Phil Tabbita, a high level APWU official who had transactions with the Employer regarding health insurance plans, was not an agent of the collective-bargaining representative of the KC unit.

The FMCS card check for the KC unit was based on a March 24 written agreement between the APWU and the Employer. The agreement was signed by Dimondstein, acting as an APWU agent, and Jeff Hitt, the Employer's vice president of operations. The card check agreement includes the following provision:

> If the Union produces signed union cards representing 55% of the bargaining unit [the Employer] shall recognize the American Postal Worker's Union or its designated Local Union.

The card check agreement provided for up to 45 days for union cards to be obtained followed by the selection of a disinterested party to review the cards. Dimondstein testified, "I had informed Jeff Hitt that we hadn't decided yet, which local Union would necessarily have the jurisdiction, but that it would be a local Union."

Employee authorization cards were thereafter submitted by agreement to an FMCS Commissioner. The record does not disclose the wording of the cards and the dates the cards were signed. The record does not establish when the cards were tendered to the FMCS.

Dimondstein testified that the designation of a local union that would have jurisdiction of the KC unit was a decision to be made by him as the APWU organizer and that he designated the DM Local "in coordination with the locals involved." No details regarding any such coordination were provided. The evi-

[3] The terms of those agreements were: DM Unit and WM Unit—May 25, 2001 to September 30, 2003; JAX Unit—April 30, 2001 to September 30, 2003; GB Unit—May 29, 2001 to May 31, 2003.

[4] The attorney for the DM Local, stated at the hearing that he also represented the national APWU and would represent the APWU in this proceeding if became material.

dence does not show that the DM Local participated in the organizing effort in Kansas City, that employees in the KC unit participated in the decision to designate the DM Local or that the unit employees knew that a local union would be designated.

On an unspecified date prior to the FMCS Commissioner's determination Dimondstein spoke by telephone with Hitt. Dimondstein testified, "I informed Mr. Hitt that we had designated the Des Moines local, and Lance Coles would be involved, and that he would either be there or have somebody there . . . ." Hitt did not object. Lance Coles was president of the DM Local.[5] Hitt did not testify. There is no evidence that the question of the status of the DM Local or the process of designation was otherwise addressed prior to the announcement of the results of the card check.

On April 16, the FMCS Commissioner sent a letter to the Employer and to Coles advising them of the outcome of the card check. The FMCS letter states, in relevant part, "Upon completion of this card check I find that there are 76 valid applications for union representation. This represents a sufficient number for the union to be recognized as the bargaining agent for the employees of Mail Contractors of America." Dimondstein testified that he could not recall whether he gave any directions to the FMCS regarding where the confirmation letter should be sent. Dimondstein testified that Coles had conversations with the FMCS, but there is no evidence regarding the content of any such conversations. There is no other evidence on the issue of why the FMCS letter was sent to Coles.

After April 16 and prior to the initial bargaining meeting, both Coles and Dimondstein sent letters to the Employer requesting information regarding existing health insurance and benefits. Coles' letter indicates that Dimondstein and Phil Tabbita, an APWU representative in Washington, D.C., were copied. Tabbita had negotiated with the Employer regarding the units at the CBA terminals and had expertise regarding health insurance. Dimondstein testified that Hitt called him and asked who was in charge and to whom he should send the requested information. Dimondstein testified:

> A. I told Mr. Hitt that the Local had asked me to be the chief spokesperson, and I was in charge, and to send both of the answer[s] to my request and Mr. Coles' request, to me.
>
> Q. And did you clear that with Mr. Coles?
>
> A. Yes, I did.
>
> MR. PAGANO: Objection; "Did you clear that with Mr. Coles?" . . . that is totally leading.

In determining the agency of Dimondstein and what the status of the DM Local was in relation to the KC unit, Dimondstein's out-of-court, hearsay declaration to Hitt has been given little weight. The conclusory and uncorroborated hearsay testimony that Dimondstein "cleared" his instructions with Cole, elicited with a leading question, has been given little weight in determining the relative status and authority of the APWU and the DM Local in representing the KC unit.

Dimondstein also testified,

> I called Lance [Coles], and I told him that Mr. Hitt had called me. I said, "In the future, since you asked me to be the chief spokesperson, let all of that information come through me," and Lance said, "That makes sense, and that is fine."

This account seems contrived and was not convincingly offered. In any case, the uncorroborated and otherwise unsupported hearsay account that Coles asked Dimondstein to be chief spokesperson has little probative value on the issue of the status and authority of the APWU and the DM Local or on Dimondstein's authority. Moreover, it falls short of unequivocal evidence that Coles and Dimondstein considered the DM Local to be the exclusive representative. As discussed infra, there is evidence consistent with the two labor organizations later seeking to be jointly recognized. The designation of a single spokesperson would not be inconsistent with joint recognition.

I draw an adverse inference from the failure of the General Counsel to call Coles. Dimondstein testified that Coles was the president of the DM Local at the time of the hearing and no sufficient explanation was offered for his nonappearance. When a party fails to call a witness, who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. See *International Union, UAW v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987). I infer that had he testified, Coles would have testified contrary to Dimondstein regarding the claim that the DM Local appointed Mark Dimondstein to be an agent of the DM Local as lead negotiator in collective bargaining with the Employer and the claim that the DM Local controlled the negotiations regarding the KC unit.

There are a number of general principles that are relevant to the issue of whether the General Counsel has proven that the DM Local became the Section 9(a) representative of the KC unit as a result of the card check.

A collective-bargaining representative has the right to choose whomever it wishes to represent it in negotiations and may confer upon an agent authority to act on its behalf. *Rath Packing Co.*, 275 NLRB 255, 256 (1985); *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). The Section 9(a) representative of employees does not, however, have the right to transfer its representational responsibilities to another labor organization and the employer is not required to extend recognition based upon such an attempted transfer. *Goad Co.*, 333 NLRB 677 fn. 1 (2001).

It is well settled that for purposes of the Act a local union is a separate legal entity apart from the parent union with which it is affiliated and that it is not a mere branch or administrative arm of the latter. *Electrical Workers (Franklin Electric Construction Co.)*, 121 NLRB 143, 146 (1958).

In an initial organizing context, the Board has found in a number of cases that a parent national or international union had the right to name an affiliated local union to be the repre-

[5] The record does not disclose by whom Coles was employed. Tony Olson, an employee in the KC unit and a member of the negotiation committee for the KC unit, testified that Coles was not an employee of the Respondent.

sentative of a newly formed collective-bargaining unit, where there is evidence that such a designation was contemplated by the terms of the authorization cards or that the card signers were otherwise aware that a local would be designated. See *Cam Industries*, 251 NLRB 11 (1980); *Kosher Plaza Supermarket*, 313 NLRB 74 (1993); *Norfolk Southern Bus Corp.*, 76 NLRB 488 (1948); *Nubone Co.*, 62 NLRB 322 (1945); *Jerry's United Super*, 289 NLRB 125 (1987). Thus, the circumstances of the execution of authorization cards must show that card signers know the identity of the union being designated as the bargaining representative. See *Le Marquis Hotel, LLC*, 340 NLRB 485 (2003), and cases cited therein; *World Wide Press Inc.*, 242 NLRB 345, 365 (1979). Otherwise, when a national or international union designates a local union, the status of the local union is generally that of a servicing agent. See *Rath Packing Co.*, supra, *General Electric Co. v. NLRB*, supra.

The record evidence in the present case does not show that the authorization cards submitted to the FMCS Commissioner referred to representation by a local union. The presence of such a provision would support the General Counsel's position regarding the identity of the 9(a) representative. Based upon an adverse inference I draw from the failure of the General Counsel to place the authorization card language in evidence, I conclude that the cards did not refer to the naming of a local union by the APWU. The evidence does not otherwise show that the card signers were aware that a local union could be designated. The record discloses no internal union policies or regulations that might clarify the relationship between the APWU and the DM Local in this respect. No one identified as having a leadership position in the DM Local testified.

Based on all the foregoing, I conclude that the General Counsel has not established by a preponderance of the evidence that the employees chose to be represented by a local union. The weight of the evidence is that as a consequence of the card check the employees selected the APWU as their exclusive collective-bargaining representative on April 16. The evidence is consistent with the DM Local being designated by the APWU to be a servicing agent.

There was an initial bargaining meeting on June 4. Those present included APWU Agent Dimondstein and DM Local President Coles. The Employer representatives included Hitt and the Employer's General Counsel, David Bachman. Dimondstein presented a written contract offer on noneconomic issues.

The cover page of the union proposal did not refer to the DM Local. It appears as follows:

Proposed
"Non-Economic" Provisions of the
COLLECTIVE BARGAINNING AGREEMENT
BETWEEN
MAIL CONTRACTORS OF AMERICA, INC.
AND
AMERICAN POSTAL WORKERS UNION
(APWU), AFL–CIO
Representing Kansas City, Terminal

Various clauses in this noneconomic proposal were tentatively agreed to, including the preamble and a recognition clause.

The preamble and recognition article read in pertinent parts:

> Preamble
>
> This Agreement [is] made . . . by and between [the Employer] . . . and The American Postal Workers Union (APWU), AFL–CIO, Des Moines Iowa Area Local, APWU, hereinafter known as the "Union."
>
> Article 1. Union Recognition
>
> The Employer recognizes the Union as the exclusive bargaining agent for [the KC unit].

Thus, the cover page identifies only the APWU as the contracting union. The APWU and the DM Local are separately identified in the preamble. The full name of the APWU precedes that of the DM Local and the name of the DM Local includes its APWU affiliation. A fair reading of the preamble is that it identifies both the national APWU and the DM Local as parties to the contract. The record does not show that there was any discussion of the naming of both labor organizations in the preamble. The evidence is insufficient to establish that at the June 4 meeting it was agreed that the DM Local would be substituted for the APWU. Rather, the weight of the evidence is that at the initial bargaining meeting the APWU and the DM Local were recognized as the joint representatives of the KC unit.

Alternatively, the evidence is consistent with the DM Local being recognized as a servicing agent for the APWU on June 4. If the DM Local was a servicing agent, that would not affect the decision in this case. Where a parent union is the Section 9(a) representative of a unit and appoints a local union as a servicing agent, the Board finds that the servicing agent shares the 9(a) status of the parent union. See *Saint-Gobain Industrial Ceramics*, 334 NLRB No. 60 (2001) (not reported in Board volume).

Whether the DM Local was recognized on June 4 as a joint representative of the KC unit or as a servicing agent for the APWU, the DM Local acquired Section 9(a) status and the APWU retained its Section 9(a) status.

E. The Alleged Unfair Labor Practice

1. Kansas City health insurance changes in 2002

The alleged unfair labor practice is that the Respondent changed the health insurance benefits of the KC unit on September 1, 2002, without notice to the employees' collective-bargaining representative and without affording the representative an opportunity to bargain regarding the change, in violation of Section 8(a)(1) and (5) of the Act. As amended at the hearing the complaint specifically alleges that the changes alleged as violative include changing the health insurance provider from Corporate Benefit Services of America to Blue Cross Blue Shield of Arkansas; changing from a partially self-insured to a fully insured plan; changing coverage, deductibles, and benefit levels; increasing the amount of employees' premium contributions; eliminating $15,000 in term life insurance previously included with health insurance; and implementing a new re-

quirement that all employees participate in Respondent's group health insurance plan.[6]

The employees in the KC unit were covered by the employer-wide health plan in place at the time of recognition until September 1. The employer-wide plan was a self-insured plan. An outside contractor handled the administration of employee claims and the Employer carried reinsurance to limit a portion of its self-insurance exposure. The plan also provided $15,000 in term life insurance that was bundled with the health insurance. The Employer had a contract with Corporate Benefits Services of America (CBSA) for health insurance services for the employer-wide plan. The CBSA contract expired on August 31. There is no evidence indicating that other entities provided health insurance services for the employer-wide plan during the term of the Employer's contract with CBSA. I infer that the claims administration services, reinsurance, and life insurance were provided by or through CBSA.[7] The parties referred to the employer-wide health and life insurance plan as the CBSA plan. The Employer paid an amount for the CBSA plan consistent with the requirements of the Service Contract Act (SCA). The Employer also paid an additional amount for the insurance as part of the drivers' compensation, referred to as a subsidy. The drivers could choose self-only, self and spouse, or family coverage. Each driver paid insurance premiums that varied depending on the coverage chosen. Because the CBSA plan was self-insured, the amount of the Employer subsidy varied depending on the total claims at all the covered terminals during the plan year.

On August 12, the Employer issued a memorandum to employees in the KC unit that announced changes in insurance effective September 1. On July 31, a similar memorandum had been sent to all other employees, excluding the KC unit and the drivers at the CBA terminals. The memoranda announced that the Employer would no longer offer the CBSA plan and that a Blue Cross-Blue Shield of Arkansas plan (BCBS) would be available instead. Information and forms for enrolling in the BCBS plan were provided. The announced changes in health insurance were implemented on September 1.

This BCBS differed significantly from the CBSA plan. The BCBS plan was a fully insured health plan. The BCBS plan, unlike the CBSA plan, had two levels of coverage, a basic plan and a buy-up plan, with different employee premiums. The coverage, deductibles, and benefit levels of the BCBS plan were different and in some respects less favorable to the employee. The employee premiums were different and the Employer subsidy was sharply reduced. The BCBS plan mandated that all new employees enroll, while the CBSA plan permitted an employee to opt out in some circumstances. The term life insurance benefit provided with the CBSA health insurance plan was not provided with the BCBS plan.

It was agreed at the hearing that any losses to individual employees in the KC unit caused by the changes should be addressed in a backpay proceeding, if a violation was found and a make-whole remedy was ordered.

2. Health insurance prior to 2002

The Employer has historically provided a companywide group health insurance plan available to all employees, except those covered by a union contract that specified a different plan. The companywide health insurance plans each had a plan year and the employer was free to change the plan and carrier at the end of each plan year. The Employer's practice has been to annually solicit vendors of health insurance plans before selecting the companywide plan for the next plan year. An annual open season gave employees an opportunity to make permitted changes in their health insurance.

At the time the initial APWU collective-bargaining agreements were negotiated for the four CBA terminals there was a companywide Great West health insurance plan, with a plan year of August 1, 2000 through July 31, 2001. The collective-bargaining agreements negotiated for the CBA units provided for a fixed employer health insurance subsidy in addition to the SCA mandated benefit and provided for the transfer of the represented employees out of the Great West plan and into the health insurance plan selected by the Union. The Union selected Union Labor Life Insurance Company (ULLICO). The Union retained a contractual right to designate different health benefit packages during the terms of the labor agreements, with the same Employer contributions. Initially there was coordinated bargaining for the DM, WM, and JAX units. A ULLICO health plan group comprised of the DM, WM, and JAX units was formed. The GB unit was separately negotiated because Board certification was pending at the time of the coordinated bargaining. The GB agreement was negotiated in three days. The Union added the GB Unit to the ULLICO group plan.

APWU Representative Phil Tabbita played a major role in negotiating and implementing the ULLICO group plan for the CBA units. He was at the negotiating table and was the lead negotiator of the economic terms of the DM, WM, and JAX contracts. He was not at the negotiating table for the GB unit, but he dealt with the Employer's General Counsel, David Bachman, regarding that unit and Tabbita approved the health insurance plan for the GB unit. Tabbita arranged for the ULLICO group plan for the DM, WM, and JAX units based upon the group census and the claims data of the three units. He arranged for the GB Unit to be added to the group without claims data for that unit.

Tabbita continued to handle insurance related issues for the CBA terminals after the contracts were negotiated and there were regular communications between Tabbita and Bachman by fax, telephone, and e-mail regarding insurance issues. Issues they addressed included the cancellation of a short-term disability policy at the CBA terminals; a scheduled July 31 expiration of a supplemental benefits plan for employees at all terminals, including the KC unit; and the scheduled expiration of the ULLICO plan on May 31. The ULLICO plan expiration was extended to August and a new ULLICO plan was arranged with an effective date of August 1.

[6] There has been no motion to amend the complaint to allege any other violation. The General Counsel does not contend and the record does not show that other violations not specifically alleged were fully litigated.

[7] If, in fact, the Employer arranged for reinsurance or other health insurance services independently of CBSA, it would not affect my decision.

The parties entered into a written stipulation regarding Tabbita. A portion of that stipulation, edited for conciseness, is set forth in the following five paragraphs.

> Starting around January 2001, to the dates of the collective-bargaining agreements covering DM, WM and JAX Units, effective in June or July 2001, Tabbita, an APWU official and representative was authorized by APWU to act, and he did in fact act, as the chief negotiator with respect to all economic issues, including health benefits and supplemental long-term disability, dental, vision, and optional life insurance benefits for those units. A collective-bargaining agreement was later negotiated for the GB Unit effective on or about May 29, 2001.
>
> Tabbita continued through September 1, 2002, to have authority from the APWU to act as an agent of those four locals, and those four local[s] continued to authorize Tabbita to deal with MCA on issues involving the implementation of health benefits and supplemental long-term disability, dental, vision, and optional life insurance benefits for the DM, WM, GB and JAX Units.
>
> The Employer offered and continues to offer supplemental long-term disability, dental, vision, and optional life insurance benefits (Supplemental Benefits) on a voluntary basis to all employees, whether or not they are represented by a union. The collective-bargaining agreements covering the DM, WM, GB and JAX Units provided that the Supplemental Benefits offered company-wide would apply to these four bargaining units.
>
> On July 30, 2002, Bachman faxed Tabbita a document indicating changes in company-wide Supplemental Benefits. On July 31, 2002, the Employer's benefits manager Cathy Bradley sent Tabbita a copy of a memorandum to "All Drivers reporting to Jacksonville, Greensboro, West Memphis, and Des Moines Terminals" regarding enrollment for Supplemental Benefits. On or about July 30, 2002, or within a few days of that date, Tabbita had communications with Bachman, either by telephone or e-mail or both, in which they discussed communications to employees. In the JAX, WM, GB and DM Units regarding changes in Supplemental Benefits.
>
> From in or about January 2001, through September 1, 2002, Tabbita was authorized by the APWU to act as an agent of the APWU affiliated locals for the DM, WM and JAX Units and from on or about May 29, 2001, for the GB Unit with respect to health insurance and Supplemental Benefits. As such, Tabbita had the authority to act, and he did in fact act, on behalf of the four APWU locals during such period with respect to health insurance and Supplemental Benefits for the DM, WM, GB and JAX Units and Tabbita was an agent of the four APWU locals during such period with respect to health insurance and Supplemental Benefits for DM, WM, GB and JAX Units within the meaning of Section 2(13) of the Act.

3. Background of the 2002 change from CBSA to BCBS

In the spring of 2001, at the same time the Employer was bargaining with the Union regarding the DM, WM, JAX, and GB units, the Employer retained a health insurance consultant to review available health insurance plans and to seek bids for a group health insurance plan to replace the Great Western plan. Bids were solicited for a companywide plan, excluding the DM, WM, JAX, and GB units, but including the KC terminal.

The insurance consultant submitted to the Employer an analysis and recommendations based on the submissions of the health insurance carriers who had responded to a request for bids. CBSA was selected to replace Great West for the plan year beginning August 1, 2001. The Great West plan was extended one month and the CBSA plan year actually began September 1, 2001, preceded by an open enrollment period.

At a meeting of the employer's Board of Directors on October 24, 2001, it was decided that when the CBSA plan year ended on September 1, 2002, the Employer would discontinue that plan. The reason was that the cost of self-insurance was unpredictable and the Employer wanted to avoid paying more than its competitors who also bid for USPS delivery contracts.[8] At a January 31, 2002 board meeting the human resources department reported that an evaluation of the regulations for making the health plan changes were under way.

On April 2, Bachman participated in a conference call with Lisa Larson, an insurance consultant, who was retained to shop for a replacement for the CBSA health care plan for the non-CBA terminals. She requested and was furnished with the number of employees, ages, gender, location, eligibility, current health insurance enrollment, and the hourly fringe benefit amount available. Larson was informed that no subsidy in addition to the SCA mandated fringe benefit would be available. In fact, when a new plan was implemented on September 1, the Employer paid a subsidy at a lower level than it had paid under the CBSA plan.

On April 10, Larson submitted a written proposal for the assessment and implementation of a new health care plan for the non-CBA drivers, which was accepted. The timeline projection in the proposal was:

Week of June 3:	Initial presentation of findings
Week of June 10:	Review of recommendations
Weeks of June 17-24:	Finalist presentation, final analysis, and decision
Month of July:	Finalize details of all plans, review documents, contracts, and prepare enrollment documents, contracts, and prepare enrollment materials, etc.
Month of August:	Enrollment
September 1:	New package effective date

Larson began a search for a plan to replace CBSA and issued a request for proposals to health insurance providers and reviewed possible plans with the Employer. BCBS was one of the insurance providers who were invited to respond.

The General Counsel has not contended and the evidence does not show that there was a causal relationship between protected union activity and the decision to change the com-

[8] At that time the annual subsidy in excess of the Service Contract Act requirements was $2.8 million. Minutes of a July 25 Board meeting describe the amount of subsidy provided by the Employer's competitors as minor.

panywide group health insurance plan in 2001, and the actions regarding the change that were taken prior to April 16.

4. Bargaining regarding the KC unit health insurance

In late April, the Union requested information regarding various matters, including the existing health insurance benefits for the KC unit. Bachman responded on May 17, and furnished the information and copies of relevant documents Dimondstein had requested, except for records of health plan usage (herein claims data) for the past 2 years. The Employer did not provide claims data until August 20, as discussed infra.

The General Counsel argues that the Employer's May 17 response was incomplete because it did not "clearly provide information regarding Respondent's contribution to the cost of health insurance. . . ." In the Employer's response Bachman provided the data necessary to readily derive the information in the specific form requested. The information furnished has not been shown to have been inadequate or an impediment to bargaining, especially considering the APWU's technical familiarity with health plans and the Service Contract Act. Bachman nevertheless explained how to derive the information in an August 21 e-mail.

Dimondstein testified that he was not promptly furnished a seniority list requested on April 29. A list of employees with start dates was sent to him on May 17, but in alphabetical rather than order of start date. After Dimondstein stated his preference in the initial negotiation session, the Employer provided a list organized in order of start date on June 6. The evidence does not demonstrate that the delay in furnishing this information in the format preferred by the Union interfered with negotiations, especially considering the relatively small number of employees in the unit.

The General Counsel also contends that the Employer did not provide PPO information requested in Dimondstein's April 29 letter. In fact, PPO information is contained in an attachment to Bachman's May 17 response and it has not been shown that the PPO information provided was not responsive to the request in Dimondstein's letter.

There is no allegation and no contention that the Employer violated the act by delaying or refusing to furnish information. However, the General Counsel contends that the Employer's responses to information requests support the allegation that the changes in health insurance for the KC unit were unlawful.

The initial collective-bargaining meeting for the KC unit was on June 4. The representatives of the Employer included Bachman and Hitt for the Employer. Union representatives included Dimondstein and Coles. Tabbita was not present at any of the negotiation meetings. Prior to the day of the meeting the Employer had accepted Dimondstein's proposal that agreement on noneconomic issues should be reached before economic issues were discussed. Nevertheless, the rising cost of health insurance was mentioned in the Employer's opening remarks. Dimondstein's opening remarks also addressed health insurance. He testified:

> The only thing that was said about health insurance in Kansas City was in my opening statement, I made a brief presentation that we had a mature relationship with each other, that we didn't have a lot of secrets, that our goal, as a Union, was to have a Greensboro-plus—we called it a Greensboro-plus contract, you know, but within that Greensboro-plus, there were certain things that both sides may want changed. . . . I pointed to, was that both sides were unhappy with Union Labor Life Insurance, and their processing of claims, and their servicing, and so that certainly as we headed into the future, we may want to put our heads together about that issue, in collective bargaining, as well.

This testimony by Dimondstein is consistent with Bachman's notes made during the June 4 meeting and is credited.

The parties met again on June 5 for about half the day. Dimondstein testified that there was no discussion of health insurance on June 5. Bachman's negotiation notes made during the meeting state, "Tabbita believes BCBS could be an opportunity to save money in a joint plan." This notation follows the description of the contract negotiations and immediately prior to the notations regarding the participant's future meetings. Bachman testified that at this meeting Dimondstein remarked that Tabbita believed that a BCBS plan could be beneficial and suggested that Bachman call Tabbita. This testimony by Bachman is credited because it was credibly offered, is supported by his negotiation notes made during the meeting and is not improbable. Bachman and Tabbita had earlier discussed a significant rate increase for ULLICO coverage at the CBA terminals that was announced in March that would raise employee paid premiums. At that time Tabbita had remarked that he was considering BCBS as an alternative to ULLICO.

On June 5 no date was set for the next meeting because of conflicts by representatives for both sides, Dimondstein and Bachman later conferred by phone and it was agreed that the next negotiation meeting would be on July 31 and August 1.

On June 18, KC unit census information that Dimondstein had requested on June 4 was faxed to him. The information was also mailed to Tabbita at his office in Washington, D.C., with a cover letter. The cover letter states, in part:

> Please find attached the Kansas City census information you requested. We also faxed a copy to Mark Dimondstein as he requested.

Bachman testified that his best recollection was that Tabbita requested the census in May, but no details of the circumstances of the request were provided. Tabbita testified that he did not request the census prior to August 19, when he spoke with Bachman by phone and requested census and claims information.[9] Tabbita testified that at the time he received the June 18 letter he was aware that Dimondstein had requested the census information, based on his discussions with Dimondstein about bargaining for the KC unit. If negotiated health insurance benefits for the KC unit were like those at the CBA terminals, Tabbita would be responsible for arranging the ULLICO insurance. Tabbita did not testify that his communications with Dimondstein prior to the June 18 letter concerning the Kansas City negotiations were casual conversations and it is unlikely that they were. Each man reported directly to top officials at the APWU headquarters in Washington, D.C. Tabbita's office

[9] The record reflects that he requested the census by e-mail on August 21.

was located at the APWU headquarters, while Dimondstein's office was in Greensboro, North Carolina. The evidence is consistent with Tabbita having had an official interest in health care negotiations for the KC unit and Bachman had no evident motive on June 18 to fabricate a request by Tabbita for the census. I credit Bachman based on the probabilities and his credibly offered testimony on this issue.

By June 25, the Employer had reviewed information gathered by the insurance consultant and had concluded that a BCBS plan was the best choice for the companywide plan, but with some open issues. Bachman had specifically advised the consultant that union negotiations might cause the KC unit to pull out of the plan. The testimony of Bachman and a June 26 marketing analysis submitted by the consultant show that the terms of the BCBS plan proposed, and thereafter implemented, would permit the Employer to remove the KC unit from the BCBS plan without affecting the continuation of the plan or causing a rate revision.[10]

In a telephone conversation on July 15, Tabbita and Bachman discussed the possibility of BCBS replacing ULLICO at the CBA terminals. Tabbita was aware on July 15, that the Employer was considering changing the companywide health plan from CBSA to a BCBS plan. Tabbita testified that moving the CBA units into a BCBS plan was attractive to the APWU if the benefits were like those of the ULLICO plan. Bachman was interested in attempting to convince Tabbita that the Union should move from ULLICO to the companywide BCBS plan. On July 15, Tabbita did not have information regarding the benefits and employee premiums under the companywide BCBS plan under consideration. The Employer had asked the consultant to bid a plan with no employer subsidy. The collective-bargaining agreements at the CBA terminals required the Employer to pay specified health benefit subsidies that presumably could reduce premiums for those employees, if the companywide BCBS plan replaced ULLICO.

The testimony of Tabbita and Bachman regarding this conversation varied in some respects. The more credibly offered and probable testimony shows that Bachman asked Tabbita to consider moving from ULLICO to BCBS under a benefit package that Bachman said he would send to Tabbita, which was the benefit package developed for the company-wide plan. Claims experience under ULLICO was relevant to bringing the CBA units into the new company plan that was being bid because of the number of employees involved. Bachman and Tabbita discussed getting the ULLICO claims information to BCBS.

Tabbita's testimony that Bachman agreed in the July 15 conversation to seek a separate BCBS bid with ULLICO benefits for the CBA units is not credited because it was less credibly offered and less probable than Bachman's description of the conversation. At the time of his July 15 conversation with Bachman, Tabbita did not know what the benefits, employee premiums, and employer subsidy would be under the BCBS plan that Bachman was proposing. If Tabbita asked for a different bid for the CBA units it would have amounted to an anticipatory rejection of Bachman's BCBS plan. It is unlikely that Bachman would agree to get a different BCBS plan for the CBA units when he intended to submit the companywide plan to Tabbita as a proposed replacement for ULLICO. Moreover, it would not be Bachman's duty to select a new plan for the CBA units; that right was contractually reserved to the Union. There was no apparent incentive for Bachman to become involved in arranging a different BCBS plan for only the CBA units.

Tabbita knew that the Employer's plan was to include all the non-CBA employees in a BCBS plan and that the CBSA plan was going to be discontinued. Thus, although the KC unit was not individually discussed, the evidence shows that Tabbita understood that the Employer intended to put the KC unit in the BCBS plan, unless a different arrangement negotiated.

Later on July 15, Bachman sent an e-mail to Tabbita. The e-mail stated:

> In regard to the ULLICO claims information, the BCBS contact is Johnny Runnell. The claims information can be faxed to him at [fax number]. Also, as soon as they send me the detailed benefits breakdown, I'll fax it to you. I expect it late today or early tomorrow morning.

Bachman's e-mail set forth above is consistent with his testimony regarding his conversation with Tabbita earlier that day. The references to the BCBS contact person and to ULLICO claims information are coupled with a commitment to send a detailed benefits breakdown on the companywide BCBS plan and are inconsistent with Tabbita having already rejected that plan.

On July 16, a Tuesday, Bachman faxed a copy of the BCBS summary plan description to Tabbita. The fax header shows that it was faxed to Bachman from the insurance consultant that day. Bachman's cover memo pointed out differences from the ULLICO plan. The costs of the plan were not included, but Bachman's memo stated that there would be no employer subsidy. Bachman's remarks included the following:

> We have not shared this information with employees, and we plan to roll-out this package whether the union and non-union groups are combined or not. Therefore, please treat this information as confidential until we have notified the employees.
>
> After you have reviewed the information, please call me as soon as possible. I will be in the office the rest of the week. Also, I e-mailed you the BCBS contact for the claims information from ULLICO.

Tabbita testified as follows regarding what he did regarding the July 16 e-mail:

> A. I talked to Mark about it. I don't recall ever giving him the document.
>
> Q. So you never gave him a document regarding the terms and conditions of employees you represent—
>
> A. It didn't—
>
> Q. —which was going to come into effect on September 1st?

[10] This was so because the minimum rate of employee participation required by the BCBS plan for the non-CBA group was 75 percent and the KC unit was well below 25 percent of the group. When the BCBS plan was implemented the Employer made participation mandatory.

A. I never got anything from Mr. Bachman concerning employees we represented.

Q. So you didn't represent the employees in Kansas City?

A. Yeah, but that document he sent me on July 16th, didn't say anything about Kansas City.

Thus, Tabbita acknowledged that he discussed the information in Bachman's July 16 fax with Dimondstein. Tabbita had also called Dimondstein and discussed the Employer's BCBS plans immediately after his July 15 conversation with Bachman. Tabbita did not respond to Bachman's e-mails or ask for any explanation.

Tabbita's claim that Bachman's July 16 e-mail did not concern the KC unit because it "didn't say anything about Kansas City" is inconsistent with the plain meaning of the e-mail. Moreover, Tabbita was expert on the subject of health insurance and an experienced contract negotiator. Bachman credibly testified that he had told Tabbita that the CBSA plan year ended on August 31. The argument that Tabbita did not understand that on July 16, that the Employer planned to implement the BCBS plan on September 1, as a replacement for the CBSA at the non-CBA locations, including the KC unit, is not plausible. Tabbita's claim that he did not understand on July 16 that the Employer planned to replace the SBCA plan at Kansas City with the BCBS plan is not credited.

The General Counsel's contention that Bachman's reference to combining the "union" and "non-union" groups qualified the Employer's announced plan to replace SBCA coverage with BCBS is not a fair reading of the sentence and is unconvincing. The e-mail says that BCBS would, in any case, be implemented. Tabbita understood that when the SBCA plan expired, the only health insurance that would be available for the KC unit would be the BCBS plan, unless the Union negotiated something different for that unit.[11]

Tabbita testified that he did not give a copy of the July 16 fax to Dimondstein because he and Bachman did not discuss Kansas City and because of Bachman's request that the information be kept confidential. The record shows that Tabbita called Dimondstein immediately after his July 15 conversation with Bachman. The fax was obviously highly relevant to the Kansas City negotiations because it revealed that the CBSA plan covering the KC unit would be terminated 47 days later and would be replaced with BCBS, absent some other arrangement negotiated with the Union. Tabbita's testimony that he did not share this information with Dimondstein is not credible. It would be essential for the APWU agent at the table to be aware immediately that the Employer intended to discontinue the CBSA plan and replace it with a BCBS plan.[12] As noted supra, Tabbita testified that he talked to Dimondstein about the e-mail.

On July 25, the BCBS plan was presented to the Employer's board of directors. The plan and the implementation date were approved, with the addition of a weekly subsidy of $15 per employee. There is no evidence that the subsidy was added for any reason other than legitimate business considerations. Negotiations on noneconomic issues were scheduled for July 31 and August 1.

The next relevant contact between Tabbita and Bachman was on July 30 when they spoke by telephone regarding changes in supplemental insurance for all the terminals, including Kansas City. Following the telephone call Bachman faxed an 11-page document explaining the changes in supplemental insurance to Tabbita. There was a cover memo that invited Tabbita's response, but no mention of health insurance. Tabbita testified that they also discussed Kansas City health insurance on July 30, and that he told Bachman that he did not have authority regarding that issue and that Bachman would have to talk to Dimondstein.

Bachman testified that he had a telephone conversation with Tabbita about who would represent the Union in negotiations regarding Kansas City health insurance, but that it occurred on July 31. According to Bachman, he called Tabbita during a break in negotiations to get Tabbita's response to his July 30 fax regarding supplemental insurance and to discuss Kansas City health insurance. The Employer had planned to send a package regarding supplemental insurance to employees. Bachman testified that Tabbita said he had to see Mark Dimondstein about Kansas City health insurance. Bachman testified that Tabbita offered no explanation, but did say that he would continue to discuss a joint plan for the CBA terminals. Bachman denied that Tabbita said that he did not have "authority" regarding Kansas City.

Dimondstein testified that Tabbita called him on the evening of July 30 and related a conversation he had with Bachman that day. He testified that regarding the health insurance issue, "Phil told me to inform Mr. Bachman that he had no authority to deal with Kansas City."

Bachman testified that he approached Dimondstein in the hall during a break on July 31, and said that Tabbita had told him that he needed to get together with Dimondstein and that he asked Dimondstein if he had any thoughts about Kansas City and health insurance. According to Bachman, Dimondstein looked surprised and said, "You have to maintain status quo." According to Bachman, Dimondstein asked when the plan ended and was told August 31. Dimondstein testified that there were no health care proposals on July 31, but did not specifically deny the July 31 hallway discussion.

Based upon the probabilities and the credibly offered testimony of Bachman I credit his testimony regarding the telephone conversations with Tabbita on July 30 and 31, as well as his description of the hallway conversation on July 31.[13] As discussed earlier, Tabbita and Dimondstein had known since

[11] While I do not rely on it in reaching a decision, I note that the record reflects that Bachman regularly used the term "non-union" to refer to the employees not covered by a collective-bargaining agreement and he referred to the employees covered by collective-bargaining contracts as "union." The weight of the evidence is that Tabbita understood what Bachman meant when he used those terms.

[12] In addition, Tabbita's knowledge on July 16 that the Employer intended to terminate the CBSA plan and implement BCBS at the non-CBA terminals on September 1 is imputed to the APWU.

[13] Tabbita may have also called Dimondstein on the night of July 30, to help him prepare to respond and give him instructions, if Bachman raised the health care issue.

July 16 that the CBSA plan expired on August 31, and that BCBS would be implemented for the KC unit on September 1, if something else was not negotiated. I specifically do not credit the testimony that Bachman asked Tabbita if he had "authority" regarding the KC unit and that Tabbita said that he did not have "authority."[14] Dimondstein's show of surprise and of ignorance of when the CBSA plan would expire was feigned.

On August 1, the parties met again for negotiations. Bachman, Dimondstein, and employee Olson were present and testified about the meeting. According to Dimondstein, he asked Bachman, "Don't you have something you need to raise with us, and discuss with us about possible changes in health insurance?" Dimondstein testified that he told Bachman that Tabbita had told him to expect the Employer to raise the issue, that there were potential changes. This testimony impressed me as being contrived and embellished. I found the testimony of Bachman and Olson—that Dimondstein simply asked if the Employer had anything in regarding health insurance—to be more probable and more credibly offered. I do not credit Dimondstein's testimony that he was told that the company had not decided how to deal with Kansas City or Olson's similar testimony. Rather, I credit Bachman's testimony that Dimondstein was told the Employer would get back to him and that there followed a discussion of status quo. Regarding the discussion of status quo, I credit Bachman's testimony, "that Dimondstein explained that what he meant by status quo was, that we had to keep everything the same, meaning the same plan, same benefits, same pricing, same everything, and I explained that we understood his position on status quo and we'd get back to him."

The witnesses agree that there was a second conversation regarding health insurance later on August 1 in the hall. Dimondstein reiterated and emphasize the Union's position that the Employer had to maintain the status quo. Bachman related that there was another brief conversation about health insurance in the hallway following August 1 when Dimondstein again stated that everything had to remain the same.

Dimondstein told Bachman on August 1, that the claims data he had requested in April had not been furnished and he asked when it would be provided. Bachman's response was that the claims data had been delayed because it had to be obtained from CBSA and that CBSA did not have the ability to extract only claims filed by employees at particular terminals and the information had to be manually retrieved from printouts of the claims filed by employees at all terminals. Dimondstein did not state the reason the Union needed the information.

Tabbita testified that he had a telephone conversation with Bachman while Bachman was in Kansas City for negotiations July 31-August 1. He testified that he called Bachman, but did not recall the purpose of the call. Tabbita related that he asked Bachman whether he had raised the issue of health insurance with Dimondstein and that Bachman said that all Dimondstein wanted to talk about was the status quo. Tabbita testified that Bachman described his concept of the status quo was change, explaining that every year the health insurance was bid, the benefits were tweaked and there were different premiums. Tabbita testified that was not what Dimondstein meant by status quo and that what Dimondstein meant at a bare minimum was that the employee premium would not change, nor would the benefits of the plan change unless those were agreed to at the table. This account is credited. In light of my earlier findings, I conclude that this conversation occurred on August 1.

On July 31, the Employer's director of human resources sent a memorandum to all employees, other than those in the DM, WM, JAX, GB, and KC units, with a packet of information relating to the BCBS plan and the new supplemental insurance, including a BCBS summary plan description, a statement of employee premiums and enrollment forms. The cover memo stated that the plans would replace the existing plans on September 1. The employees were asked to submit the enrollment forms by August 16.

Bachman was in Portland, Oregon, August 5–10 at a trade convention. While he was there the director of human resources contacted him and advised him that if a decision was not made soon on the KC unit health insurance the employees would not have health insurance after August 31, when the CBSA group insurance plan expired. When Bachman returned to his office on August 10, he sent to Dimondstein the packet of materials that had been announced to the employees at the other CBA terminals by overnight mail and the cover letter by fax, with a copy to Coles. The cover letter included the following:

> As we discussed during our most recent negotiating sessions held on August 1 and 2, [sic, July 31 and August 1] the current group insurance program covering unit employees as well as other similarly-situated employees will expire effective August 31, 2002. This will cause the implementation of a successor group insurance program effective September 1, 2002, applicable to unit employees as well as similarly situated employees.
>
> As to the successor group insurance program, Blue Cross & Blue Shield ("BCBS") will become effective for health coverage; Ameritus will become effective for dental and vision coverage, and Standard will become effective for short-term disability, long-term disability, and supplemental life coverage.
>
> Regardless of the expiration of the current plan and the implementation of a successor plan applicable to unit employees and similarly-situated employees, we nonetheless remain open to negotiating any proposal you may present regarding unit employees' coverage and insurance programs which of course can be effective immediately or in the future as set forth in a collective bargaining agreement.
>
> Enclosed please find a complete packet that will be distributed to employees (i.e. Q&A sheet, enrollment information, Summary Plan Descriptions, etc.) for the insurance plans which will become effective on September 1.

Dimondstein testified that for the period August 9–18, he was not available to negotiate because of an APWU convention. When Dimondstein and Bachman spoke on August 1 about scheduling the next meeting, Dimondstein told Bachman that he would be attending the convention in August. I credit Bachman's testimony that he did not know the specific dates of

[14] This testimony, if credited, would arguably complement the claim that the DM Local was the exclusive representative of the KC unit.

the convention. Bachman sent the August 10 letter and overnight mail to the fax number and mailing address in North Carolina that Dimondstein had provided.

On August 12, the Employer's director of human resources sent the insurance materials to the employees in the KC unit, including the announcement the changes in health insurance would be effective September 1. The Kansas City drivers employees were asked to return the enrollment forms by August 23.

While he was at the APWU convention, Dimondstein received a phone call from Kansas City driver Tony Olson, who told him that he had received the health insurance packet. Dimondstein called Hitt. Dimondstein testified:

> I said, "Jeff, how in the hell can you do that." I said, "We talked about it; I said to you, if you want to make changes, you have got to negotiate, and if not, you have to main [sic, maintain] the status quo of the plan until those negotiations take place," and he said, "We have remained status quo. This is the status quo to us. We have researched it; Mr. Bachman has researched it, and this is the deal."

Tabbita testified that he and Dimondstein had discussed the Kansas City negotiations while they were at the convention. Tabbita testified that Dimondstein wanted to complete the Kansas City negotiations by the end of the month and that Dimondstein asked him to see if the KC unit could be added to the ULLICO group plan and to seek a BCBS quote at the ULLICO level of benefits.

On August 19, Bachman returned a call from Tabbita. Each testified about the conversation and Bachman's contemporaneous notes were received into evidence. An amalgam of what the more probable and credible evidence establishes is that Tabbita told Bachman that the Union was filing an unfair labor practice charge against the Employer based on the announced changes in health insurance. Bachman told Tabbita that Dimondstein thought the CBSA plan should be continued with the same benefits and deductions, but that it was not possible to continue the CBSA plan just for the KC unit and that if the Employer did not move forward with BCBS, the drivers would not have health insurance after August 31. Tabbita asked if the Employer was open to other options. Bachman said they were and suggested that the issue be addressed at the next negotiation meetings scheduled for August 27–28. Tabbita told Bachman that Dimondstein thought the negotiations could be wrapped up fairly quickly and that the unfair labor practice charge could be resolved at the same time. Tabbita asked Bachman whether the quotation from BCBS for coverage at the CBA terminals had been received. Bachman stated that he had not yet received the quotation.[15] Tabbita also asked for the claims data that had been requested in April. On August 20, Bachman faxed the claims data to Tabbita and Dimondstein.

[15] Tabbita asked ULLICO to send claims information for the CBA units to BCBS. Apparently the delay was related to inadequate data that ULLICO had provided to BCBS. Tabbita testified that he also asked Bachman to look at getting a quotation from Blue Cross Blue Shield for the Kansas City drivers at the ULLICO level of benefits. Bachman's notes and testimony do not reflect that such a request was made.

Bachman's testimony shows that the claims data could not be immediately furnished following the April request because it had to be obtained from CBSA. CBSA did not have the ability to extract only claims filed by employees at particular terminals and the information had to be manually retrieved from printouts of the claims filed at all terminals with CBSA insurance. Tabbita testified that he inquired about the claims data on August 19, because Dimondstein had asked him at the APWU convention the week before to obtain a bid from ULLICO to add the KC unit to the plan covering the CBA units.

On August 21, Dimondstein submitted additional requests for information by e-mail and complained that previously requested information had not been furnished. The previously requested information had, in fact, been furnished. Bachman immediately responded to Dimondstein by e-mail and provided details as to when the information had been provided.

On August 21, Dimondstein also asked, for the first time, for the amounts of the employer subsidy for the announced BCBS plan. Bachman provided that information by e-mail that day. On August 23, Dimondstein asked for past-incurred costs to the Employer for claims expenses, which were also requested by Tabbita the week before. Bachman replied that he was getting the information and would forward to Dimondstein.

Tabbita sent an e-mail to Bachman on August 21, stating that he could not find the census for the KC unit that Bachman had sent to him in June and asked for some additional information regarding five claimants, indicating that Tabbita had given ULLICO the claims information that the Employer had provided.

On August 22, the unfair labor practice charge was filed and the next day the Employer signed agreements with BCBS for a basic and a buy-up plan covering all employees, other than the CBA units.

The parties next met for negotiations on August 27–28. On August 27, the parties addressed health insurance. Dimondstein, Olson, and Bachman described what was said and Bachman's negotiation notes were received as an exhibit. The August 27 meeting began with Dimondstein opening a discussion of health insurance that lasted about an hour. Dimondstein voiced his objection to the announced changes in health insurance, asserted that the Employer had not bargained the change with the Union. Dimondstein reminded the Employer that at the meeting on August 1, he had asked if the Employer had anything for the Union on health insurance and had been told that the Employer would get back to the Union. Dimondstein reiterated his position that the Employer was required to maintain the status quo and keep everything the same. Hitt responded that the CBSA plan could not be continued just for Kansas City and that the status quo had been maintained because the KC unit had been treated the same and if the Employer had put them in some other plan that would have been treating them differently. Hitt contended that the Employer had the right to make the change. Dimondstein challenged Hitt's contention that the status quo had been maintained and referred to lower benefits in BCBS plan and the reduced Employer contribution. Hitt stated that the Employer was open to alternatives. Dimondstein proposed, pending further contract negotiations, that in applying the BCBS plan to the KC unit the Em-

ployer maintain the existing Employer contribution, maintain the CBSA copays and prescription benefits. Dimondstein stated that this was not a contract proposal, but was an interim measure that would also address the Board charge. The Employer was unwilling to accept this proposal.

The foregoing account of what occurred at the August 27 meeting is an amalgam of the most probable and credibly offered testimony, much of which was basically consistent. Olson asked during the discussion if the CBSA plan could be extended. I do not credit his uncorroborated testimony that Bachman said that it could be done, but it was now too late. Bachman's denial was more probable and more credibly offered.

On August 27, Bachman also called Tabbita and told him that he had not gotten a quotation from BCBS for the CBA units. The parties did not discuss health care on August 28 and agreed to meet next on October 2. The health care changes were implemented on September 1.

II. ANALYSIS

Ordinarily, when an employer makes unilateral changes in an existing term or condition of employment of employees who are represented for the purposes of collective bargaining, the employer violates Section 8(a)(1) and (5) of the Act without any showing of bad faith. *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz*, the Court did recognize that unilateral action might be justified in some circumstances.

Generally, where the parties are engaged in negotiations for a collective-bargaining agreement, an employer may not engage in piecemeal bargaining where the employer bargains to impasse and then implements changes in a particular matter without first bargaining to an overall impasse for the agreement as a whole. *RBE, Electronics of S. D., Inc.*, 320 NLRB 80, 81 (1995); see also *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd., 15 F.3d 1087 (9th Cir. 1994). The evidence shows, and there is no dispute, that an overall impasse had not been reached in negotiations for a contract for the KC unit prior to the changes in health insurance that were made on September 1.

On brief the General Counsel acknowledges that the Respondent has established a past practice with regard to the timing of periodically reviewing health insurance benefits that permits it an exception to the general rule against piecemeal bargaining.[16] The General Counsel contends, however, that health insurance was a mandatory subject of bargaining that was unilaterally changed without first bargaining to impasse. Thus, the General Counsel contends that the discontinuance of the CBSA coverage and the implementation of the BCBS plan for the KC unit was a per se refusal to bargain based on the *Bottom Line Enterprises*, supra.

The Employer contends that it was privileged to implement the heath insurance changes for the KC unit because the change was based on a decision made before it had a duty to bargain regarding the KC unit. The board of director's minutes and the credible testimony of Bachman show that the decision was made on October 24, 2001, to discontinue CBSA self-insurance at the non-CBA terminals on September 1, 2002, and to move to a fully insured plan, as well as to reduce or eliminate the health insurance subsidy. The subsequent actions regarding the selection and implementation of a plan to replace the CBSA plan were consistent with the decision made in October 2001. Thus, on January 31, 2002, the human resources department was reviewing the regulations for making the changes; on April 10, the Employer engaged a consultant to find an acceptable provider; and on April 10, the consultant's proposed timetable for assessing alternative plans and implementing a new plan on September 1, was accepted by the Employer. There is no contention and no evidence that the Employer's decision to replace the CBSA plan was related to union activity.

If an employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by its later implementation of that change. *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992); *SGS Control Services*, 334 NLRB 858 (2001).

The General Counsel argues on brief that the Respondent had merely made a general decision to alter health insurance benefits prior to the time that the Union was recognized. I disagree. It is true that the BCBS plan did not take final shape until after the APWU was recognized, but the decision to terminate the CBSA plan, made in 2001, was not tentative. The Employer has affirmatively proven that it was privileged to discontinue the companywide CBSA plan, including coverage of the KC unit, without bargaining.

The Union was on notice on July 15 that the CBSA plan was going to be replaced. The Union had the right to insist on bargaining regarding what the health insurance benefits for the KC unit would be after the CBSA plan was terminated. It did not exercise that right, even after all the costs and benefits of the BCBS plan were disclosed. The Union elected to not address the issue until the change was announced and then did not seek real negotiations on the issue, but insisted that the changes not be implemented.

The record does not establish that the Union was aware at the time of the change that the decision to discontinue CBSA was made before the Union was recognized, but the Employer did not have an affirmative duty to volunteer that information to the Union. See *Embossing Printers, Inc.*, 268 NLRB 710 fn. 2 (1984).

The evidence does not show that the Union was prejudiced by not receiving claims information requested in late April until August 20. Tabbita testified that he inquired about the claims data on August 19 because Dimondstein had asked him at the APWU convention the week before to obtain a bid from ULLICO to add the KC unit to the plan covering the CBA units. There is no evidence that the lack of the claims data was a problem before August 20. When Tabbita actually needed the data, it was provided.

Bachman's August 10 letter to Dimondstein made it clear that the Employer was ready to negotiate something different, if the Union wished. Thus, the Employer has never contended that the decision to terminate the CBSA plan and go to a fully insured plan privileged it to determine what the employees in the KC unit would receive, if the Union negotiated a different

[16] At the hearing the General Counsel contended that an overall impasse was necessary.

benefit. The Employer initially delayed announcing the BCBS plan to the KC employees, but the Union maintained its position. If the Employer had not implemented the company-wide plan for the KC unit, those employees would have been without health insurance. The implementation was consistent with the decision made before the advent of the Union. Given the position of the Union, I am unable to conclude that the Employer had any other reasonable choice, while adhering to its privileged decision to terminate the CBSA plan.

Accordingly, I shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Mail Contractors of America, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The American Postal Workers Union, Des Moines Area Local, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. American Postal Workers Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. The evidence fails to establish that Respondent violated Section 8(a)(l) and (5) of the Act, as alleged in the complaint. Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[17]

ORDER

The complaint shall be dismissed.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.